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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-860

THOMAS MINYARD, TED SPURLOCK, CLAIR PLATT, JAY REESE; APACHE COUNTY BOARD OF SUPERVISORS and JAMES A. McDONALD, LARRY STRADLING and ARTHUR LEE, constituting the members thereof and MARGARET LEE, in her official capacity as Clerk of the Apache County Board of Supervisors,

Petitioners,

vs.

TOM SHIRLEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

PETITIONERS' REPLY TO OPPOSITION BRIEF OF RESPONDENT

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TABLE OF AUTHORITIES CITED

CASES:

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CAPTION

Respondent in a footnote on page one of his brief contends Petitioners caption is incorrect. This is untrue. James A. McDonald was the member of the Board of Supervisors when this case was filed and continued to be through the appeal to the Arizona Supreme Court. If this Court reverses the Arizona Court he will again be the Supervisor. He is and has been an interested party and thus can and must remain on the caption. In addition,

it is not only anomalous, as Respondent's counsel suggests, for Tom Shirley to be suing himself but it is legally impossible.

JURISDICTION

Counsel for Petitioners accidentally miscited in the Petition for Certiorari that jurisdiction of this Court was conferred by 28 U.S.C. § 1254(1). Counsel intended to refer to 28 U.S.C. § 1257(3) which applies to certiorari from state courts. Petitioners respectfully request that the Court review the case pursuant to 28 U.S.C. § 1257(3) which does give this Court jurisdiction as acknowledged in Respondent's brief. There appears to be no reason why the Court cannot so treat the petition, since the Court frequently considers a case filed as an appeal as one for certiorari where improperly filed as an appeal. *Slagle v. Ohio,* 366 U.S. 259 (1961).

The statement by counsel for Respondent that "Petitioners have not presented issues in a manner sufficient to give this Court jurisdiction under any statute" is unintelligible. No further explanation for the statement is given. Indeed, the very next sentence of the brief acknowledges that the first question raised by Petitioners concerning the unconstitutionality of 8 U.S.C. § 1401 (a)(2) gives this Court jurisdiction. The "Questions Presented" in the petition clearly conform to the Supreme Court rules and under 28 U.S.C. § 1257(3) give this Court jurisdiction.

REPLY ARGUMENT

I. *Much of Respondent's Brief is Immaterial and Lacks Foundation.*

Respondent's brief is an attempt to "snow" this Court. The time and contents of the Board meeting described in the last paragraph of page 3 of Respondent's brief has nothing to do with the merits of this case.

The statement in the first full paragraph of page 8 is nothing but emotional rhetoric with absolutely no foundation in fact in this or any other law suit.

Tax writeoffs discussed on page 13 of the brief are immaterial and not supported by the record.

Finally Respondent's statement at page 17 concerning the election of an Anglo to the Arizona House of Representatives is totally irrelevant since that legislative district does not, in the least conform to the boundaries of Apache County. The district takes in much territory outside of Apache County and only covers a portion of Apache County.

II. *Significant Issues of Federal and Constitutional Law Are Raised by the Petition.*

Counsel for Respondent contends that Petitioners have not presented "a 'question' at all, let alone an 'important Federal question'." Yet the contention is directly contradicted by counsel for Respondent at page 5 of his opposition brief where he states:

> "Because of the Federal constitutional issues which appeared on the face of the complaint, Respondent removed the pending action to Federal Court . . ."

Indeed, five very substantial Federal and Constitutional issues are raised by this case. The concept of government controlled by those who are not subject to the government is totally foreign to the institution of democracy. Respondent's brief attempts to resolve for this Court the merits of the case. The duty of the Petition for Certiorari, the Response and Reply is to demonstrate that a full briefing and oral argument should be entertained by this Court in a case of such far reaching consequences. This Court has never before been called upon to consider the effect upon the rights of the non-Reservation population of the granting of a special and unique legal status to Reservation Indians based solely upon race. Petitioners do not, as Respondent suggests, contend that the Reservation Indian cannot hold office because he is an Indian. Rather, it is the special, unique, preferential legal status afforded against the minority of non-Indians in Apache County.

Undoubtedly, if the non-Negro majority of New York City or any other governmental subdivision were permitted to levy taxes upon Negros from which taxes the non-Negro majority was immune and were permitted to impose law and court jurisdiction upon the Negros while the non-Negro majority were not subject to those same laws and courts, this Court would find there existed substantial federal and constitutional issues to which the Court should turn its undivided attention. There is no reason why any less consideration should be given to the identical issues posed in this case.

As acknowledged by Respondent at page 10 of his brief, it is implicit in Petitioners argument that A.R.S. § 11-211(a), governing the qualification of Supervisors, is unconstitutional. Lest there be any doubt, it is the very definite contention of Petitioners that A.R.S. § 11-211 is unconstitutional as applied to Reservation Indians because to allow them to hold office when they are not citizens or residents and when they are not subject to taxes and laws they would impose would violate the Citizenship, Due Process and Equal Protection clauses of the 14th Amendment and the Civil Rights Act.

Whether or not Arizona can be more liberal in permitting voting than the Federal government requires is beside the point. The issue is whether or not Arizona statutes governing the qualifications for office take precedent over the U.S. constitution and the Civil Rights Act. Meeting all of the statutory requirements to hold office is of no avail if to hold that office pursuant to those statutes is unconstitutional and violative of the Civil Rights Act. Thus, A.R.S. § 11-211 is unconstitutional *as applied to Reservation Indians* in view of their legal status. It is unconstitutional because of the answers to the issues presented in Petitioners' initial Petition and this Reply.

III. *The Citizenship of Reservation Indians Poses A Substantial Constitutional Question.*

While counsel for Respondent disagrees with Petitioners inter-

pretation and application of *Elk v. Wilkins,* 112 U.S. 94 (1884), it cannot be said that its application to the Respondent in this case does not constitute an important constitutional question to be resolved by this Court upon a full briefing. Some courts, subsequent to the decision in *Elk,* may have interpreted the *Elk* decision to permit Congress to make Reservation Indians citizens without also making them subject to taxation and state jurisdiction; if so, those decision are simply wrong. Since the Supreme Court in *Elk* expressly premised its ruling concerning Reservation Indian citizenship upon the taxation and jurisdictional clauses of the 14th Amendment, any attempt by Congress to make Reservation Indians citizens *without also making them subject to taxation and state and federal court jurisdiction* would violate the 14th Amendment as interpreted by the Court in *Elk.* Undoubtedly, Congress has the power to confer citizenship, but only by legislation which is consistent with the Constitution. An individual is not a United States citizen, no matter how many times either the Respondent or Congress say he is, unless he fulfills the criteria mandated by the 14th Amendment.

Miller Bros. Co. v. Maryland, 347 U.S. 340, 74 S. Ct. 535, 98 L. Ed. 744, 748 (1954) recently confirmed that subjection to taxation is essential to citizenship when the Court stated:

> "Since the Fourteenth Amendment makes one a citizen of the state wherein he resides, the fact of residence creates universally recognized reciprocal duties of protection by the state *and of allegiance and support by the citizen. The latter obviously includes a duty to pay taxes,* and their nature and measure is largely a political matter." (Emphasis supplied.)

Similarly, subsequent to *Elk v. Wilkins,* the Supreme Court in *In Re Heff,* 197 U.S. 488, 25 S. Ct. 506 49 L. Ed. 848 (1905) reiterated that an Indian must be subject to the jurisdiction of the state in order to be a United States citizen. The Court cited approvingly the Solicitor General who stated:

> "It would seem that Congress intended citizenship of the United States to attach at the same time that the Indian

> became subject to the laws of the state or territory in which he resides. As a matter of constitutional law, an Indian appears to be entitled to benefit of, and to be subject to, the laws of the state in which he resides the moment he becomes a citizen of the United States." (49 L.Ed. at 855.)

Further, the *Heff* court stated:

> "An Indian upon whom has been conferred citizenship, and who enjoys the protection of the laws of the state, should be punished for a transgression of them." (49 L.Ed. at 856.)

Thus, serious question remains as to whether an Indian may be a citizen while immune from state law and jurisdiction. On the other hand, none of the cases cited by the Respondent analyzed the language of the 14th Amendment as it relates to Indian Citizenship as did the Court in *Elk*. Consequently, they bear little weight on the issue at hand.

As to residency, certainly the question of whether the inhabitants of a dependent nation are residents of a state and county is a substantial federal question since this dilemma was created by United States Treaty. In addition, if they are declared residents of Arizona and Apache County it gives rise to the other constitutional issues raised in the Petition for Certiorari as to whether he may hold the office of Supervisor.

IV. *Civil Right of Petitioners Have Been Violated.*

The Respondent has entirely failed to respond to Petitioners fifth question presented which alleges violations of Petitioners' Civil Rights under 42 U.S.C. § 1981. It is generally held that failure to respond to issues raised in a brief is an admission concerning that issue. *Bolova Watch Co. v. Super Dept. Stores of Arizona,* 4 Ariz. App. 553, 422 P.2d 184 (1967); 5 C.J.S. *Appeal and Error* § 1344 at 391, n.29. Thus, it is conceded by Respondent that the question regarding the violation of the Petitioners' Civil Right is a substantial Federal question warranting review by this Court.

Indeed, this is the heart of the error of the Arizona Supreme Court decision below. Recognition of this issue dispells Respond-

ents arguments that the issues raised by Petitioners are resolved by those cases which hold that one need not own property to vote in local bond elections. It is not now, nor was it ever the contention of Petitioners that the Respondent must own property to hold office. Rather, Petitioners contend that the Respondent must be subject to those same laws and taxes he seeks to impose upon Petitioners if he is to hold a public office which grants him power to impose such taxes and laws upon Petitioners.

Respondent admits that he is not subject to many of the same taxes, pains, penalties and responsibilities as are the Petitioners. Thus, § 1981 of the Civil Rights Act clearly takes effect when the Respondent seeks to impose those taxes, pains, penalties and responsibilities upon the Petitioner and when he seeks to hold the same office as Petitioners without being subject to the same pains, penalties and taxes.

V. *The Taxation Issue Does Present Constitutional Questions.*

While it is true that in some instances the Reservation Indian may pay small amounts of taxes, many aliens are subject to greater taxes than Reservation Indians. This, however, does not confer upon aliens citizenship or the right to vote and hold office.

The fact is Apache County is not financed by state income taxes which an Indian, working off the Reservation, may occasionally pay; it is not financed by Federal Income Tax which Indians may or may not pay (the question has not yet been resolved by this Court). Rather, it is financed by property taxes assessed upon real and personal property of the minority of Apache County non-Indian residents. Further, it is only the property taxes which the Respondent has the power to assess as a County Supervisor. A casual examination of the map of Apache County reveals that more than 50% of the county is Reservation lands which provide no taxable land base for the county.*

*Taxes which come from the Reservation are from non-Indians living on the Reservation or from Public or Private Utilities located on the Reservation.

While non-Indians who live on the Reservation must pay personal property taxes to the county, Indians living on the Reservation do not. Therein lies the gross inequities. Certainly such a complex and potentially devastating problem deserves the studied review of this Court after full briefing. The alternative may be a sequel to the Boston Tea Party.

VI. *The Lack of Jurisdiction Over Indian Office Holders Presents Constitutional Questions.*

Respondent contends that Civil and criminal recourse over the Respondent need not exist because he can be recalled. The suggestion is factual and legal nonsense. First, it is logical that malfeasance or nonfeasance by county officers involving county taxes or property is not a concern to the 75% Reservation Indian population who pay no taxes to the county. Consequently, the possibility is nonexistent that the necessary signatures on a recall petition, much less votes at an election could be obtained to oust an Indian Supervisor elected from a district located entirely upon the Reservation where the population is probably only 3 or 4 per cent non-Indian.**

Second, even if recall were a practical alternative, it does not mean that the Respondent need not be amenable to the other civil and criminal remedies, which would apply to the Petitioner Supervisors. This would obviously violate the express language of the Civil Rights Act. Further, it would deprive the taxpayers and county of remedies to compensate the taxpayers and the county for the Respondent's nonfeasance or malfeasance in office. This is tantamount to locking the gate after the horse has already escaped. The same rational applies to Respondent's suggestion that he can be removed without legal action for three months of non-performance in office (which is an incorrect legal state-

**After the redistricting sought in the complaint, attached as Appendix D of the petition, is accomplished, two of the three supervisorial districts will be entirely on the Reservation.

ment in any event as Petitioners will demonstrate upon a full briefing if the Court hears this case).

The case of *State Securities, Inc. v. Anderson,* ..... N.M. ....., 506 P.2d 786 (1973) cited by Respondent regarding service of process on a Reservation Indian while he is on the Reservation for acts committed off the Reservation was decided by a divided court (3 to 2). Further, it is in direct conflict with the Colorado and Minnesota Supreme Court decisions in *Martin v. Denver Juvenile Court,* 493 P.2d. 1093 (Colo. 1972) and *Commissioner of Taxation v. Brun,* 174 N.W. 2d 120 (Minn. 1970). This conflict on this important principle of Indian law is further reason why this Court should hear this case.

The question of lack of jurisdiction over Reservation Indian office holders boils down to this: Can the Respondent Supervisor because he is Indian, hold the identical office as the Petitioners and yet not be subject to *all* the sanctions, controls, or punishments imposed by law upon the Petitioner Supervisors? Further, may the taxpayers have less legal recourse against one supervisor because of his race than they do against others of a different race? Under todays concepts of Equal Protection and Civil Rights, the answer must be an obvious and resounding NO! Yet Respondent contends that there is no reason for this Court to hear this case. Rather, he has the audacity to suggest that the Petitioners remedy is to divide the county by Senate Bill 1310 (attached as an Appendix to Respondent's Brief) which bill the Navajo Tribe opposed.

VII. *Conclusion.*

Justice Lorna Lockwood, the author of the Arizona Supreme Court opinion below, erred when she ignored the wisdom of her father who wrote the opinion in Porter v. Hall, 34 Ariz. 308, 271 P. 411 (1928) which held that the Reservation Indian, being under guardianship, could not vote. In that case Justice Lockwood stated:

"It is almost unheard of in a democracy that those who make the laws need not obey them." (34 Ariz. at 322.)

The Court below has, in this case, just held that those who make the law need not be subject to them. If this is the proposed new concept of democracy, then we certainly think that it should be thoroughly reviewed by this nation's highest Court—the ultimate protector of democracy.

For this reason the Petition for a Writ of Certiorari should be granted.

Respectfully submitted this ..... day of January, 1974.

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